No. 73-1596

In the Supreme Court of the United States

OCTOBER TERM, 1973

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ROBERT E. HAMPTON, CHAIRMAN OF THE UNITED STATES CIVIL SERVICE COMMISSION, ET AL., PETITIONERS

v.

MOW SUN WONG, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No.

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of Robert E. Hampton, Chairman, and the Commissioners of the United States Civil Service Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on January 25, 1974.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-23a) is not yet reported. The opinion of the district court (App. B, *infra*, pp. 24a-35a) is reported at 333 F. Supp. 527.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, p. 36a) was entered on January 25, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a regulation of the United States Civil Service Commission that bars resident aliens from employment in the federal competitive civil service is constitutional.

CONSTITUTIONAL PROVISION, STATUTE, EXECUTIVE ORDER, AND REGULATION INVOLVED

1. The Fifth Amendment to the Constitution of the United States provides:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

2. The Civil Service Act, 5 U.S.C. 3301, provides in pertinent part as follows:

> The President may—
>
> (1) prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service;
>
> (2) ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought; and
>
> (3) appoint and prescribe the duties of individuals to make inquiries for the purpose of this section.

3. Section 2.1 of Executive Order No. 10577, 19 Fed. Reg. 7521 (November 22, 1954), provides in pertinent part:

> (a) * * * The [Civil Service] Commisison is authorized to establish standards with respect to citizenship, age, education, training and experience, suitability, and physical and mental fitness, and for residence or other requirements which applicants must meet to be admitted to or rated in examinations.

4. The Civil Service Commission's regulations, 5 C.F.R. 338.101, provide in pertinent part:

> (a) A person may be admitted to competitive examination only if he is a citizen of or owes permanent allegiance to the United States.
>
> (b) A person may be given appointment only if he is a citizen of or owes permanent allegiance to the United States. However, a noncitizen may be given (1) a limited executive assignment under section 305.509 of this chapter in the absence of qualified citizens or (2) an appointment in rare cases under section 316.601 of this chapter, unless the appointment is prohibited by statute.

STATEMENT

The respondents, four resident aliens who immigrated to the United States from China,[1] instituted

[1] Respondent Mow Sun Wong immigrated from Hong Kong in June 1969; respondent Siu Hung Mok immigrated from

the present action in December 1970, naming as defendants the Chairman and the Commissioners of the United States Civil Service Commission, petitioners here, and other government officials.[2]

The respondents challenged Section 338.101 of the Civil Service Commission's regulations (*supra*, p. 3) which excludes aliens from the federal competitive civil service. They contended, *first*, that the regulation was in conflict with congressional appropriation acts governing compensation of federal civil servants,[3]

Macao in October 1968; respondent Francene Lum immigrated from Mainland China in September 1946; and respondent Kae Cheong Lui immigrated from Taiwan in September 1968. A fifth plaintiff in the district court (Anna Yu, a 1965 immigrant from Hong Kong) did not join in the appeal below.

[2] The other defendants below were the Executive Director of the Commission, its Regional Director in San Francisco, the Administrator of the General Services Administration and its Regional Administrator in San Francisco, the Secretary of the Department of Health, Education, and Welfare and that Department's Regional Director in the San Francisco area, and the former Postmaster General, along with two regional officials of the former Post Office Department. None of these defendants has any responsibility for the establishment of standards which applicants for federal civil service employment must meet, and accordingly they have not joined in this petition.

[3] At the time of the institution of this action, the pertinent appropriations act was the Public Works Appropriations Act, 1970, § 502, 83 Stat. 323, 336-337, which provided in relevant part as follows:

> Unless otherwise specified and during the current fiscal year, no part of any appropriation contained in this or any other Act shall be used to pay the compensation of any officer or employee of the Government of the United States * * * whose post of duty is in continental

and with an Executive Order[4] which bans discrimination in federal employment on the basis of national origin; and *second*, that the regulation violated the Due Process Clause of the Fifth Amendment by impermissibly discriminating against aliens as a class. The respondents sought injunctive and declaratory relief against the petitioners to remove from the regulation the qualification of citizenship as a prerequisite of employment in the federal civil service.

In a memorandum and order issued on August 30, 1971 (App. B), the district court ordered respondents' complaint dismissed for failure to state a claim upon which relief could be granted. Rejecting respondents' non-constitutional arguments, the district court held that Section 338.101 of the Civil Service Commission's regulations was not in conflict with

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> United States unless such person (1) is a citizen of the United States, (2) is a person in the service of the United States on the date of enactment of this Act, who, being eligible for citizenship, had filed a declaration of intention to become a citizen of the United States prior to such date, (3) is a person who owes allegiance to the United States, or (4) is an alien from Poland or the Baltic countries lawfully admitted to the United States for permanent residence * * * *Provided further*, That any payment made to any officer or employee contrary to the provisions of this section shall be recoverable in action by the Federal Government. This section shall not apply to citizens of the Republic of the Philippines or to nationals of those countries allied with the United States in the current defense effort, or to temporary employment of translators, or to temporary employment in the field service (not to exceed sixty days) as a result of emergencies.

[4] Executive Order No. 11478, 34 Fed. Reg. 12985.

either congressional appropriation acts or the Executive Order (App. B, *infra*, pp. 28a-31a). Alternatively, the court held that even if the regulations conflicted with the Executive Order, the conflict would not be judicially reviewable (*id.* at 29a).

The district court rejected respondents' constitutional challenge on the ground that there was a rational basis for the Civil Service Commission's classification, and that the Commission's regulation was reasonably adapted to a permissible governmental end (*id.* at 31a-34a).

On appeal, the court of appeals reversed (App. A, *infra*), finding that the regulation is within the statutory authority of the Civil Service Commission but holding the regulation unconstitutional. The court stated that this Court's holdings in *Sugarman* v. *Dougall*, 413 U.S. 634, and *Graham* v. *Richardson*, 403 U.S. 365, "although not squarely controlling (because they deal with the states' power to discriminate against aliens *vis a vis* the Fourteenth Amendment) are instructive and significant when applied to the case at hand" (App. A, *infra*, p. 13a). The court concluded that "in the fact situation of this case and with the broad sweep of the regulation involved, we hold that it is so unjustifiable as to be violative of due process" (*id.* at 23a).

REASON FOR GRANTING THE WRIT

The holding of the court of appeals that the regulation of the Civil Service Commission barring aliens from the competitive civil service is unconstitutional

presents an important question specifically reserved by this Court in *Sugarman* v. *Dougall*, 413 U.S. 634, 646, n. 12: "In deciding the present case, we intimate no view as to whether these federal citizenship requirements are or are not susceptible of constitutional challenge."[5] In spite of this reservation, the court below relied on *Sugarman*[6] to hold unconstitutional a policy which has been followed by the federal civil service system since 1896 (Rule V of the Executive Order issued May 6, 1896, reprinted in the *18th Annual Report of the Civil Service Commission* 272 (1902)), and which the court below held the Civil Service Commission is statutorily empowered to adopt (App. A, *infra*, pp. 4a-7a). The power to limit alien access to government employment is an incident of national sovereignty in international law and a power customarily exercised in the international community. (See Roth, *The Minimum Standard of International Law Applied to Aliens* 151-152 (1949), United Nations Department of Economic and Social Affairs, Public Administration Branch, *Handbook of Civil Service Laws and Practices* 53 (1966).)

The distinction between the present case and *Sugarman* lies in the differences between national and state sovereignty in our federal system. As the

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[5] This Court has also recently recognized the existence of this longstanding policy in *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 89-91.

[6] And *Graham* v. *Richardson*, 403 U.S. 365, also involving state, not federal, action.

Court's opinion in *Sugarman* made clear, see particularly Part IV of the opinion, 413 U.S. at 646-649, the vice of the New York exclusion there involved was that it reached beyond the legitimate interests of New York as a sovereign political community. But the national government, unlike the states, exercises plenary authority over aliens and defines their rights and duties in numerous statutes and regulations. The Federal Government possesses national sovereignty and is responsible, under our Constitution, for defining the relationship between the nation and the citizens of other nations. The broad scope of this plenary authority has long been recognized in the decisions of this Court.

The dual status of an alien as an American inhabitant but a foreign citizen "leaves outstanding a foreign call on his loyalties which international law not only permits our Government to recognize but commands it to respect." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 585-586. As this Court pointed out in *Johnson* v. *Eisentrager*, 339 U.S. 763, 770:

> The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization.

Nowhere in this Court's decisions dealing with the rights of aliens is there a suggestion that among the "generous and ascending scale of rights" granted to aliens is a constitutionally protected right to federal civil service employment. On the contrary, the Court's teaching is clear that:

> * * * any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference. [*Harisiades* v. *Shaughnessy*, *supra*, 342 U.S. at 588-589.]

Alienage—unlike race, color, or national origin—is not a permanent "status," but a temporary condition. Every permanent resident alien is offered naturalization, with all the rights and privileges of citizenship, upon completion of a probationary period (generally five years, see 8 U.S.C. 1427(a)). Where an alien is freely permitted to remove his disabilities by becoming a citizen after the completion of a probationary period whose length is reasonably related to the function of the citizenship-granting process, and where those disabilities are (as here) reasonably related to permissible government objectives, those disabilities do not constitute a denial of due process of law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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Attorneys.

APRIL 1974.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 72-1079

MOW SUN WONG, ET AL., APPELLANTS

vs.

ROBERT E. HAMPTON, Chairman of the United States Civil Service Commission, et al., APPELLEES

[January 25, 1974]

Appeal from the United States District Court for the Northern District of California

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OPINION

Before: BARNES, WRIGHT, and WALLACE, Circuit Judges.

BARNES, Circuit Judge:

On December 27, 1970, appellants, five resident aliens who immigrated to the United States from China, instituted a class action against appellees seeking injunctive relief to prevent appellees from en-

forcing regulations which excluded appellants as resident aliens, from the federal competitive civil service. They also sought injunctive relief to prevent appellees from denying appellants the opportunity to apply for such federal employment positions on the basis of alienage, and a declaratory judgment declaring those portions of the regulations which automatically disqualified aliens from federal competitive civil service positions illegal and void and violative of their constitutional and statutory rights to pursue such jobs.

On August 31, 1971, the District Court denied appellants' motion for summary judgment and granted appellees' motion to dismiss. *Mow Sun Wong* v. *Hampton*, 333 F.Supp. 527 (N.D. Cal. 1971).

This appeal is before this court pursuant to rule 4(a) Fed.R. App.P. As held by the district court, jurisdiction is predicated on 28 U.S.C. § 1331(a) and the $10,000 matter in controversy requirement is met by each of the named class for the reasons concluded by the lower court. *Id.* at 529.[1]

The primary issue which confronts us is a constitutional attack by appellants as resident aliens, upon the regulations of the United States Civil Service Commission (hereinafter Commission) which, in effect, excludes such aliens from employment in the federal competitive civil service. 5 C.F.R. § 338.101

[1] Since an injunction is sought against enforcement of an administrative regulation (5 C.F.R. § 338.101), as distinguished from an Act of Congress, it was not necessary for appellants to request that a three-judge court be empaneled under 28 U.S.C. § 2282.

(1971).[2] The constitutional question is closely similar to that which the Supreme Court refused to intimate a view on, in its recent decision of *Sugarman* v. *Dougall*, 41 U.S.L.W. 5138 (U.S. June 25, 1973): whether the federal citizenship requirements of such provisions as 5 U.S.C. § 3301, Executive Order 10577, 19 Fed.Reg. 7521, § 2.1 (1954), 5 C.F.R. § 338.101, and § 502 of the Public Works Appropriation Act 1971, Pub. Law 91-439, 84 Stat. 902 are or are not susceptible to constitutional challenge. *See also In re Griffiths*, 41 U.S.L.W. 5143 (U.S. June 25, 1973). *Cf. People* v. *Rodriguez*, No. 23069 (Cal. A.2d, Dec. 11, 1973).

In *Dougall* the Court held that a New York statute, which denied aliens the right to hold positions in New York's classified competitive civil service, violated the Fourteenth Amendment's equal protection guarantee. The issue before this Court on appeal is whether the United States Civil Service Commission may, consistent with the Fifth Amendment's due process guarantee, exclude appellants and all other resi-

[2] 5 C.F.R. § 338.101 (1972), the Commission regulations, provide:

> "(a) A person may be admitted to competitive examination only if he is a citizen of or owes permanent allegiance to the United States.
>
> "(b) A person may be given appointment only if he is a citizen of or owes permanent allegiance to the United States. However, a non-citizen may be given (1) a limited executive assignment under section 305.509 of this chapter in the absence of qualified citizens or (2) an appointment in rare cases under section 316.601 of this chapter, unless the appointment is prohibited by statute."

dent aliens from obtaining employment in the federal competitive civil service.

However, before we are able to decide the constitutional issue, it is necessary to determine if the lower court correctly decided the non-constitutional arguments presented by appellants.

I. Non-Constitutional Issues.

Appellants contend that the Commission regulations, 5 C.F.R. § 338.101 (restricting employment to citizens), are invalid since they exceed the authority provided by Congress in § 502 of the Public Works Appropriation Act, *supra*.[3] The district court rejected

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[3] The Public Works Appropriation Act, 1970, Pub. L. No. 91-144, 83 Stat. 323, 336 (Dec. 11, 1969), provides in pertinent part as follows:

> "Sec. 502. Unless otherwise specified and during the current fiscal year, no part of any appropriation contained in this or any other Act shall be used to pay the compensation of any officer or employee of the Government of the United States . . . whose post or duty is in continental United States unless such person (1) is a citizen of the United States, (2) is a person in the service of the United States on the date of enactment of this Act, who, being eligible for citizenship, had filed a declaration of intention to become a citizen of the United States prior to such date, (3) is a person who owes allegiance to the United States, or (4) is an alien from Poland or the Baltic countries lawfully admitted to the United States for permanent residence. . . . *Provided further*, that any payment made to any officer or employee contrary to the provisions of this section shall be recoverable in action by the Federal Government. This section shall not apply to citizens of the Republic of the Philippines or to nationals of those countries allied with the United States in the current defense effort, or to temporary employment of translators, or to temporary employment in the field service (not to exceed sixty days) as a result of emergencies."

this contention and held that the regulations did not exceed or conflict with § 502. 333 F.Supp. at 531[4] states:

> ". . . Congress has in broad terms granted to the Executive the authority to establish standards for admission into the civil service. 5 U.S.C. § 3301. Plaintiffs would have the court, however, read a provision in an Appropriations Act as negating that express grant of authority. The more sensible view of the relationship between § 502 of the Public Works Appropriations Act and 5 U.S.C. § 3301 is that § 502 merely sets forth the broad contours within which the Executive (the Commission) is free to use its good judgment and expertise. Thus, on the court's view of § 502 and the Commission regulation, no conflict appears. The Commission has acted permissibly in relation to the Appropriations Act in not opening up the civil service to all those whom Congress has indicated it would be willing to pay for their work."

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[4] It is to be noted that if this court were to reverse the District Court on these non-constitutional issues, then it would be unnecessary to reach the constitutional issue, since our holding would be in essence that the regulations are an illegal extension of the authority delegated by Congress to establish requirements for employment in the Executive Branch. *See Jalil* v. *Hampton*, *supra* at 931. However as the text discusses, we affirm the District Court as to the non-constitutional issues.

We agree with the district court on this point. The appropriations acts are not the basis for the regulations and the Commission has acted permissibly in enacting its regulation.

The regulations prohibiting non-citizens from the competitive civil service (5 C.F.R. § 338.101), were issued pursuant to an executive order, Executive Order No. 10577,[5] which itself was issued upon the authority of a federal enabling act, the Civil Service Act, 5 U.S.C. § 3301.[6]

> "Ostensibly clear-cut, the chain of statutory authority progresses from the enabling act, providing the President with delegatable [sic] powers, to the executive order, granting certain of those powers to the Civil Service Commission, to

[5] Sec. 2.1 of Exec. Order No. 10577, 19 Fed. Reg. 7521 (1954), 5 U.S.C. § 3301 (1967), provides in pertinent part as follows:

> "(a) . . . The [Civil Service] Commission is authorized to establish standards with respect to citizenship, age, education, training and experience, suitability, and physical and mental fitness, and for residence or other requirements which applicants must meet to be admitted to or rated in examinations."

[6] 5 U.S.C. § 3301 (1970 ed.) provides:

> "The President may—
>
> (1) Prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service;
>
> (2) ascertain the fitness of applicants as to age, health, character, knowledge and ability for the employment sought; and
>
> (3) appoint and prescribe the duties of individuals to make inquiries for the purpose of this section."

> the specific regulation designed to ascertain the fitness of applicants by establishing standards with respect to citizenship." Comment, *Aliens And The Civil Service: A Closed Door?* 61 *Geo. L.J.* 207, 209 1972.[7]

Appellants' second contention of a non-constitutional nature is that the Commission's regulation contravenes Executive Order No. 11478, 34 Fed. Reg. 12985 (1969),[8] which declares it to be the policy of the Fed-

[7] The same commentator attacks what he terms the inconsistency on one hand of the President explicitly authorizing the Commission to set standards with respect to citizenship, Executive Order 10577, *supra*, and on the other hand the Commission expressly excluding all noncitizens from the competitive civil service. 61 *Geo. L.J. supra* at 210. He concludes that it is improbable that such action is permissible in view of the wording of the Civil Service Act. However, we find this argument, along with appellents' contention on the issue, although persuasive, lacking substance and authority, and we agree with the District Court.

[8] Exec. Order No. 11478, 34 Fed. Reg. 12985 (1969):

> EQUAL EMPLOYMENT OPPORTUNITY
> IN THE FEDERAL GOVERNMENT
>
> It has long been the policy of the United States Government to provide equal opportunity in Federal employment on the basis of merit and fitness and without discrimination because of race, color, religion, sex, or national origin. All recent Presidents have fully supported this policy, and have directed department and agency heads to adopt measures to make it a reality.
>
> As a result, much has been accomplished through positive agency programs to assure equality of opportunity. Additional steps, however, are called for in order to

strengthen and assure fully equal employment opportunity in the Federal Government.

NOW, THEREFORE, under and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

SECTION 1. It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, or national origin, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each executive department and agency. This policy of equal opportunity applies to and must be an integral part of every aspect of personnel policy and practice in the employment, development, advancement, and treatment of civilian employees of the Federal Government.

SEC. 2. The head of each executive department and agency shall establish and maintain an affirmative program of equal employment opportunity for all civilian employees and applicants for employment within his jurisdiction in accordance with the policy set forth in section 1. It is the responsibility of each department and agency head, to the maximum extent possible, to provide sufficient resources to administer such a program in a positive and effective manner; assure that recruitment activities reach all sources of job candidates; utilize to the fullest extent the present skills of each employee; provide the maximum feasible opportunity to employees to enhance their skills so they may perform at their highest potential and advance in accordance with their abilities; provide training and advice to managers and supervisors to assure their understanding and implementation of the policy expressed in this Order; assure participation at the local level with other employers, schools, and public or private groups in cooperative efforts to improve community conditions which affect employability; and provide for a system within the department or agency for

periodically evaluating the effectiveness with which the policy of this Order is being carried out.

SEC. 3. The Civil Service Commission shall provide leadership and guidance to departments and agencies in the conduct of equal employment opportunity programs for the civilian employees of and applicants for employment within the executive departments and agencies in order to assure that personnel operations in Government departments and agencies carry out the objective of equal opportunity for all persons. The Commission shall review and evaluate agency program operations periodically, obtain such reports from departments and agencies as it deems necessary, and report to the President as appropriate on overall progress. The Commission will consult from time to time with such individuals, groups, or organizations as may be of assistance in improving the Federal program and realizing the objectives of this Order.

SEC. 4. The Civil Service Commission shall provide for the prompt, fair, and impartial consideration of all complaints of discrimination in Federal employment on the basis of race, color, religion, sex, or national origin. Agency systems shall provide access to counseling for employees who feel aggrieved and shall encourage the resolution of employee problems on an informal basis. Procedures for the consideration of complaints shall include at least one impartial review within the executive department or agency and shall provide for appeal to the Civil Service Commission.

SEC. 5. The Civil Service Commission shall issue such regulations, orders, and instructions as it deems necessary and appropriate to carry out this Order and assure that the executive branch of the Government leads the way as an equal opportunity employer, and the head of each executive department and agency shall comply with the regulations, orders, and instructions issued by the Commission under this Order.

SEC. 6. This Order applies (a) to military departments as defined in section 102 of title 5, United States Code, and executive agencies (other than the General

eral Government to provide equal opportunity in Federal employment for all persons, and to prohibit discrimination in employment because of race, color, religion, sex or *national origin*. Appellant alleges the key term, "national origin", was intended to apply to permanent resident aliens. The district court, however, correctly interpreted the term "national origin" as being limited to discrimination between United States citizens only and that no distinction should be made on the basis of their respective national origins.

Despite an Equal Employment Opportunity Commission guide-line[9] prohibiting citizenship discrimi-

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Accounting Office) as defined in section 105 of title 5, United States Code, and to the employees thereof (including employees paid from nonappropriated funds), and (b) to those portions of the legislative and judicial branches of the Federal Government and of the Government of the District of Columbia having positions in the competitive service and to the employees in those positions. This order does not apply to aliens employed outside the limits of the United States.

SEC. 7. Part I of Executive Order No. 11246 of September 24, 1965, and those parts of Executive Order No. 11375 of October 13, 1967, which apply to Federal employment, are hereby superseded.

/s/ RICHARD NIXON

THE WHITE HOUSE,
August 8, 1969.

[F.R. Doc. 69-9556; Filed, Aug. 8, 1969; 4:24 p.m.]

[9] 29 C.F.R. § 1606.1(d) states in part:

"Because discrimination on the basis of citizenship has the effect of discriminating on the basis of national origin, a lawfully immigrated alien who is domiciled or residing in this country may not be discriminated against on the basis of his citizenship. . . ."

nation, the Supreme Court in a recent decision, *Espinoza* v. *Farah Manufacturing Co., Inc.*, 42 U.S.L.W. 4014 (U.S. Nov. 19, 1973), held that such discrimination does not always constitute "national origin" discrimination, and thus is not necessarily barred by § 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1). The Court found that nothing in the Act makes it illegal to discriminate on the basis of citizenship or alienage. *Id.* at 4017. *Espinoza's* application to this case is limited in that it involved only private employment, whereas we are concerned with the right to federal employment under the Civil Service.[10]

Appellants with good reason suggest that § 6 of Executive Order No. 11478, in stating: "This order does not apply to aliens employed outside the limits of the United States", is proof that the order was intended to apply to aliens employed inside the limits of the United States. However, assuming such an interpretation is justified, and the Executive Order is ambiguous on this point so as to permit an interpretation, we still agree with the lower court that even if we are to assume the regulation contravenes Executive Order 11478, such conflict would not be

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[10] It is noted that in *Espinoza*, the Court explicitly stated that it "need not address that question here, for the issue presented in this case is not whether Congress has the power to discriminate against aliens in federal employment, but rather, whether Congress intended to prohibit such discrimination in private employment." *Id.* at 4015-16. The Court recognized this pending case in a footnote. *Id.* at 4015 p. 4.

judicially reviewable (333 F.Supp. at 530), because the Executive Order merely declares a general policy.

Appellants argue that such a conclusion is directly contra to the holding of *Jalil* v. *Hampton*, 460 F.2d 923 (D.C. Cir. 1972) discussed *infra*, which specifically states such an order is judicially reviewable. But the executive order referred to in *Jalil* as being reviewable was not one declaring a general policy, but was the same Executive Order No. 10577 which was the authority upon which the regulations were based.

II. Constitutional Issues

The Commission regulations allow a person to be admitted to competitive examination or given appointment "only if he is a citizen of or owes permanent allegiance to the United States." 5 C.F.R. § 338.101(a)(b). The district court, relying on immigration cases concerning entry and deportation, concludes that Congress' plenary power over aliens lessens the proper standard of judicial scrutiny to be applied to the discrimination and exclusion of aliens from the federal competitive civil service to that of whether the classification has a rational basis. 333 F.Supp. at 532. Appellants contend that the proper burden for the government to meet is that of showing a compelling government interest to justify the discrimination against them and other resident aliens similarly situated by the Commission regulations.

To state that Congress' plenary power over aliens enables the federal government to unreasonably dis-

criminate against aliens, neglects to consider the fact that even Congressional plenary power is subject to Constitutional limits. *United States* v. *Thompson*, 452 F.2d 1333, 1338 (D.C. Cir. 1971) (Appellants' Brief, pp. 18-19).[11]

The rationales and holdings of *Sugarman* v. *Dougall*, *supra*, and *Graham* v. *Richardson*, 403 U.S. 365 (1971), although not squarely controlling (because they deal with the states' power to discriminate against aliens *vis a vis* the Fourteenth Amendment) are instructive and significant when applied to the case at hand.

Dougall involved Section 53(1) of the New York Civil Service Law which read:

> "Except as herein otherwise provided, no person shall be eligible for appointment for any position in the competitive class unless he is a citizen of the United States." 41 U.S.L.W. at 5138.

Justice Blackmun, in holding that the statute violates the Fourteenth Amendment equal protection guarantee, stressed the fact that Section 53 is neither narrowly confined nor precise in its application. Its imposed ineligibility may apply to the "sanitation man, class B (citation omitted), to the typist, and to

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[11] With its plenary power, Congress can prevent or limit the number of aliens entering the country, and thus, can decrease or eliminate the problem raised in this case. But once legally within our country's borders, there are constitutional limitations as to how aliens can be treated by the government, vis-a-vis citizens of this country.

the office worker, as well as to the person who directly participates in the formulation and execution of important state policy. The citizenship restriction sweeps indiscriminately." *Id.*, at 5141.

The Commission regulation here also sweeps indiscriminately excluding *all* aliens from *all* positions requiring the competitive Civil Service examination. See *Jalil* v. *Hampton*, *supra*, at 930 (Bazelon, J., dissenting).

The Court in *Dougall* was careful to point out that it did not hold that on an individual determination an alien could not be refused or discharged from public employment, even on the basis of noncitizenship, but only if a legitimate state interest relating to qualification for a particular position or to the characteristics of the employee were present. *Sugarman* v. *Dougall*, *supra* at 5142. Thus, for instance, in the present case, if national security were involved in a particular position, or requirements of citizenship as qualifications for political office, the government interest would be compelling enough to offset discrimination against aliens. But, a flat prohibition from any level of federal employment as the regulations dictate creates a different situation. The appellants named in the class are a janitor, file clerk, clerk typist, mail clerk, and educational evaluator. (Appellants' Brief pp. 3-5). Surely these positions and the majority of civil service positions [12] do not ac-

[12] ". . . the Civil Service Commission, discriminates against resident aliens as a class, prohibiting them from qualifying

tually participate either in the making or in the execution of national policy, as contended by appellees. (Appellees' Brief p. 13).

Aliens are a "suspect" class, as stated in *Graham* v. *Richardson*, *supra* at 372, because aliens "are a prime example of a 'discrete and insular' minority (*see United States* v. *Carolene Products Co.*, 304 U.S. 144, 152-153, n.4 (1938)) . . ." and classifications based on alienage are "subject to close judicial scrutiny." 403 U.S. at 372.

Appellees urge that *Graham's* holding be limited to a welfare case. However, *Dougall* clearly cites (Graham as authority for imposing a compelling state interest test in the field of public employment. 41 U.S.L.W. at 5141; *see also Chapman* v. *Gerard*, 456 F.2d 577 (3d Cir. 1972); *Younus* v. *Shabat*, No. 71-C-1423 (N.D. Ill., Nov. 16, 1971). (Appellants' Reply Brief pp. 8-10).

In *Nielsen* v. *Secretary of Treasury*, 424 F.2d 833 (D.C. Cir. 1970), the court referred to decisions invalidating state measures discriminating against aliens, and although the holding is inapposite to our situation, the case is relevant in displaying recognition that the federal government, like a state, must show reasonableness of and justification for any measure discriminating against aliens. *Id.* at 846.

Although in *Dougall* and *Graham*, aliens were protected from discrimination on the basis of the Equal

for approximately 2,689,800 government jobs." 61 *Geo. L.J. supra* at 220.

Protection Clause of the Fourteenth Amendment, can the equal protection guarantee against alien discrimination be implied in the Due Process Clause of the Fifth Amendment? In *Bolling* v. *Sharpe*, 347 U.S. 497 (1954) the Supreme Court stated at 499:

> "The Fifth Amendment . . . does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law' and therefore we do not imply that the two are always interchangeable phrases. But the Court has recognized that discrimination may be so unjustifiable as to be violative of due process." *See also Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Schneider* v. *Rusk*, 377 U.S. 163, 168 (1964).

Bolling v. *Sharpe* thus makes clear that a federal law may impose such an impermissible discrimination as to be a denial of due process. A number of lower court decisions have recognized this relation between the equal protection guarantee and the Due Process Clause. *Morris* v. *Richardson*, 346 F.Supp. 494, 499 (N.D. Ga. 1972);[13] *Faruki* v. *Rogers*, 349

[13] Provision of Social Security Act which disqualified certain illegitimate children from sharing equally with their half-siblings in survivors' benefits on death of wage-earner parent denied equal protection.

F.Supp. 723 (D. D.C. 1972).[14] *See also Moritz* v. *C.I.R.*, 469 F.2d 466 (10th Cir. 1972); *In re Smith*, 323 F.Supp. 1082 (D. Colo. 1971) stating at 1088:

> "By characterizing the problem presented in this case as one of equal protection, we do not mean to suggest that fifth amendment due process takes in all of fourteenth amendment equal protection. It is enough to note that fifth amendment due process does include an equal protection principle, Shapiro v. Thompson, 394 U.S. 618, 641-642, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969), and that the two provisions are co-extensive insofar as they prohibit discrimination based upon race, Bolling v. Sharpe, 347 U.S. 497, 499, 74 S.Ct. 693, 98 L.Ed. 884 (1954), and other discriminations which are invidious or deprive persons of constitutional rights. Shapiro v. Thompson, supra."

The question becomes whether or not the Commission's regulations result in such "unjustifiable discrimination as to be violative of due process." Section 352(a)(1) of the Immigration and Nationality Act of 1952 provided that a naturalized citizen, with some exceptions, loses citizenship by continuous residence for three years in the country of origin. Citing *Bolling* v. *Sharpe's* "unjustifiable discrimination" lan-

[14] Held that statute providing that no person shall be eligible for appointment as a Foreign Service officer until he has been a United States citizen at least ten years was not shown to be necessary to further a compelling governmental interest, and thus violated the equal protection guarantee applicable to the federal government through the due process clause of the Fifth Amendment.

guage, the Court held that the statute was discriminatory and violative of due process under the Fifth Amendment, since no restriction against length of foreign residence applied to native-born citizens. Similarly, a flat prohibition against aliens obtaining employment in the civil service is such discrimination to be a denial of due process unless the government can show a compelling interest for maintaining its classification. "While there may be no constitutional right to public employment as such, there is a constitutional right to be free from unreasonably discriminatory practices with respect to such employment." *Whitner* v. *Davis*, 410 F.2d 24, 30 (9th Cir. 1969).

In *Jalil* v. *Hampton*, *supra*, in what was essentially the same factual pattern as the present case (a challenge of the same Commission regulations), the District of Columbia Circuit remanded to the trial court to decide the non-constitutional questions, since there were no findings of fact in the district court's order. Judge Bazelon's dissent infers that the remand was based on a desire to "forbear" from ruling on the constitutional question and to dispose of the case on the non-constitutional issues. *Id.* at 931. Here, findings of fact were made and as determined above in deciding the non-constitutional questions against appellant, a resolution of the constitutional issue is indeed necessary. The court in *Jalil* recognized that classifications based on alienage are suspect and that the government need justify such discrimination on the ground of a compelling governmental interest. *Id.* at 929. Judge Bazelon's dissent cites the extreme

injustice involved in excluding all aliens from the federal competitive civil service, and refers to the lower court decision recently affirmed by the Supreme Court in *Dougall*:

> "In Dougall v. Sugarman, *supra*, a three-judge panel struck down, without a factual hearing, a New York statute which excluded all aliens from the competitive class of the Civil Service, on the grounds that none of the interests which New York advanced were adequate justifications for this classification under the standards of Graham v. Richardson. In the case before us, the federal government raises no different, or more compelling interests. It is therefore inconceivable that the Government could establish a compelling state interest at a factual hearing to justify the exclusion of *all* aliens from *all* positions requiring the competitive Civil Service examination." *Id.* at 930.

The question remaining for us is whether the Government has established a compelling interest or proper government objective to justify the total exclusion of aliens from the federal competitive civil service.[15]

Appellees set forth various arguments supporting their position that there is a compelling government interest offsetting any discrimination on the basis of alienage. Also, the District Court raised various

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[15] Appellants on page 24 of their brief make a strong argument for finding that even under the less onerous general rational relationship standard, the government fails to satisfy its burden.

points in support of its finding that the regulations did not violate any constitutional provisions. Most of these points were rejected in *Dougall* when considering whether New York had shown a compelling interest counterbalancing its discriminatory classifications. When applied to the federal discrimination, the arguments break down for similar reasons.

The lower court, in its decision, accepted as one justification for the government's action, the government's "right to provide for the economic security of its citizens before its resident aliens." 333 F. Supp. at 532. This line of reasoning, termed the "special public interest" doctrine, *Crane* v. *New York*, 239 U.S. 195 (1915) (that the government satisfied the economic needs of its citizens by restricting distribution of its resources to its citizens), has been discredited and rejected by the Supreme Court in *Graham* v. *Richardson*, *supra*. The rejection of this doctrine is supported in the public employment area. *Sugarman* v. *Dougall*, *supra* at 5141. The California Supreme Court in *Purdy & Fitzpatrick* v. *California*, 71 Cal. 2d 566, 79 Cal. Rptr. 77 (1969), also rejected the "economic security" justification, because the "alien may be a resident who has lived in California for a lengthy period, paid taxes, served in our armed forces, demonstrated his worth as a constructive human being, and contributed much to the growth and development of the state." *Id.* at 88. A resident alien must assume certain obligations in return for being allowed to reside lawfully in the United States. He

must pay taxes. He is subject to military service. 50 U.S.C. App. § 454(a). He contributes to the economic growth and welfare of this country. *Graham* v. *Richardson*, *supra* at 371. While it might be thought he could and should cure his disability by simply applying for and obtaining his citizenship, there appears to be no logical justification for discrimination against aliens on economic grounds.

Appellees also contend that resident aliens have no constitutional right to make or carry out national policy or partake in any of the institutions of government. The lower court found that government "function(s) more smoothly and efficiently and more securely if competitive civil service positions are limited to citizens." 333 F.Supp. at 533. It is an oversimplification to infer, as appellees do, that all aliens should be excluded from the competitive civil service because they "should not be in a position to exercise national sovereignty; clearly, the large majority of civil service positions involve no such responsibilities." 61 *Geo. L.J.*, *supra* at 220.

Appellees, however, assert that the factors of "loyalty and security" make Federal Government service differ vastly from the ordinary employer-employee relationship. This is indeed true. We have no doubt that under certain circumstances our government may, for loyalty and security reasons, properly require citizenship for certain government positions. But the Commission regulations fail to delineate any specific positions where security, loyalty and policy-making require that the citizenship requirement be essential for employment. Instead they automatically

exclude all aliens from the competitive civil service; an instance of overbreadth.

Appellees point to the qualifications for high political office as authority for the proposition that the Constitution is clear in placing control of the government in the hands of citizens only. *Dougall* recognizes the state's right in an appropriately defined class of position to require citizenship as a qualification for office. We think this proper. But as with the Court in *Dougall*, we fail to see how a universal ban on alien employment can be justified because specific positions involve high degrees of security, loyalty, and policy-making. Thus, the problem of insuring loyalty, security and policy-making to citizens can be accomplished more effectively by classifying jobs as to their sensitive and nonsensitive nature. 61 *Geo. L.J.*, *supra* at 221. The regulations fail to make any such distinction.

Appellees point to the universal practice of other nations requiring civil servants to be citizens. Such a contention, though relevant on the reasonableness of the discrimination, does not prove a compelling government interest. Its application toward solving the constitutional issue is questionable.[18]

The conclusion found in *Purdy & Fitzpatrick* v. *California*, *supra*, although a state employment case, also applies here that:

> "The discrimination involved denies arbitrarily to certain persons, merely because of their status as aliens, the right to pursue an otherwise lawful occupation. The classification within the statutory scheme operates irrationally without reference to any legitimate state interest except that of favoring United States citizens over citizens from other countries. The latter objective does not reflect such a compelling state interest that it would permit us to sustain this kind of discrimination." 79 Cal. Rptr. at 90.

[18] *See* 61 *Geo. L.J. supra* at 221.

We hold that the Commission regulations unreasonably discriminate against resident aliens based solely on their status as aliens. We reject the contention of the appellants that the protection provided by the Fifth Amendment is co-extensive with the equal protection clause of the Fourteenth Amendment. However, in the fact situation of this case and with the broad sweep of the regulation involved, we hold that it is so unjustifiable as to be violative of due process. Here there is no logical or persuasive reason advanced as to why aliens should be excluded from all federal civil service employment; nor is there a refinement of qualifications such as fluency with English, etc., which may or may not prevent employment of an alien. The broad sweep is the vice. It could be saved only by a compelling governmental interest. We have no doubt such a compelling government interest can be shown as to many civil service jobs, but the government has failed to show such a compelling interest for all jobs, and thus, the flat prohibition of the Commission regulations, 5 C.F.R. § 338.101, is a denial of due process, and unconstitutional. We thereby reverse and remand with instructions to grant appellants the injunctive relief sought.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-70 2730 RFP

[Original Filed Aug. 31, 1971]

MOW SUN WONG, et al., PLAINTIFFS

v.

ROBERT E. HAMPTON, Chairman of the United States Civil Service Commission, et al., DEFENDANTS

MEMORANDUM AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

• • • •

This is an action by Chinese residents of the United States, seeking to overturn regulations of the United States Civil Service Commission ("Commission") which exclude these non-citizens from the competitive civil service. 5 C.F.R. § 338.101 (1971). The Commission is authorized to establish standards with respect to citizenship by Executive Order No. 10577 § 2.1(a), 19 Fed. Reg. 7521:

> The Commission shall be responsible for open competitive examinations for admission to the competitive service which will fairly test the relative capacity and fitness of the persons examined for the position to be filled. The Commission is authorized to establish standards with respect to citizenship, age, education, training and experience, suitability, and physical and mental fitness, and for residence or other requirements which applicants must meet to be admitted to or rated in examinations.

The authority whereby the President promulgated this Executive Order lies in the delegation by Congress to the President to promulgate standards for admission into the civil service. 5 U.S.C. § 3301.

Plaintiffs—Chinese residents who have been denied the opportunity to apply for federal civil service jobs—challenge only the Commission's regulation. In pertinent part, that regulation reads:

> § 338.101 *Citizenship*
>
> (a) A person may be admitted to competitive examination only if he is a citizen of or owes permanent allegiance to the United States.
>
> (b) A person may be given appointment only if he is a citizen of or owes allegiance to the United States. • • •

Plaintiffs contend that this regulation contravenes the due process clause of the Fifth Amendment; violates Executive Order No. 11,478 (relating to freedom from job discrimination within the federal government) and conflicts with § 502 of the Public Works Appropriation Act, 1970, Pub. Law 91-144, 83 Stat. 336-337, (relating to compensation of employees of the government). Plaintiffs seek a declaration of invalidity of the Commission's regulation on any one of the above grounds, and an injunction to restrain the defendants—who are members of the Civil Service Commission, the Administrator of the General

Services Administration, and the heads of various other governmental agencies—from continuing to act upon the regulation.

Initially, the government contends in response that no subject matter jurisdiction resides in this court, or that sovereign immunity stands as a bar to this action. The court rejects both of these contentions.

Subject matter jurisdiction over this action is conferred by 28 U.S.C. § 1331(a), the federal question section. That provision grants to this court original jurisdiction of all civil actions wherein the matter in controversy exceeds $10,000 and arises under the Constitution or laws of the United States. Plaintiffs specifically allege that "the matter in controversy" from their viewpoint is certainly in excess of the jurisdictional amount. While it is admittedly difficult to value the right to a job, looking at the issue from the vantage of plaintiffs (see 1 Moore's *Federal Practice*, ¶ 0.91[1] at 827) and considering the importance of the right asserted (cf. *Hague* v. *C.I.O.*, 307 U.S. 496, 529-532 (separate opinion of Mr. Justice Stone); *Murray* v. *Vaughn*, 300 F.Supp. 688, 649-695 (D. R.I. 1969), the court is persuaded that the jurisdictional amount is satisfied by each plaintiff herein. Moreover, § 1331 is available as a jurisdictional basis even though no monetary relief is sought. See 1 Moore's *Federal Practice*, ¶ 0.95 at 862-863.

There is of course no doubt that this action is one which "arises under" the Constitution and the laws of the United States. The basic allegation is that the Commission's regulation is invalid because it is unconstitutional or at least is fatally inconsistent with a Congressional enactment. In other words, a non-frivolous claim is set up and rests directly upon federal law. Accordingly, the action "arises under" that law within the meaning of § 1331. See generally Wright, *Federal Courts* (2nd Ed. 1970) §§ 17, 18. This court therefore has jurisdiction of the within action.

The government also contends that this suit is in reality one against the United States, the sovereign, and that no statute sets up the right to sue the United States herein. That is, the sovereign has not waived its immunity from suit. This contention is easily met, however. Whether or not a given suit can properly be characterized as one against the sovereign—an inquiry which is probably analytically unsound anyway—the established law is that sovereign immunity does not bar a suit against federal officers where it is alleged that the officer's action is "not within the officer's statutory powers, or their exercise in the particular case, are constitutionally void." *Malone* v. *Bowdoin*, 369 U.S. 643,647 (1962), quoting from and reaffirming *Larsen* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 702 (1949). See generally 3 Davis, *Administrative Law Treatise*, § 27.01 at 546-547, § 27.03, § 27.10. Since the plaintiffs in this action contend that the defendant's actions violate both the Constitution and their statutory authority, the doctrine of sovereign immunity is certainly inapplicable. *Laycock* v. *Kenney*, 270 F.2d 580,584 (Ninth Cir. 1959).

On the merits of the case, the court believes the non-constitutional arguments of the plaintiffs to be more substantial than their constitutional arguments, but for the reasons to be stated herein, it is the government's urgings on the merits which are correct.

Plaintiffs contend that the Commission regulation in question contravenes Executive Order No. 11478, 34 Fed. Reg. 12985 (Filed August 8, 1969) (Ex. "C" to complaint). This Order declares it to be the policy of the Federal Government, and that discrimination based upon race, color, religion, sex, or national origin is expressly prohibited. Plaintiffs hinge upon the reference to "national origin" and conclude that discrimination based upon citizenship status is prohibited. But from the face of the document itself, this conclusion appears incorrect. The initial language of the Order is: "It has long been the policy of the United States Government * * *", indicating that this Order was not intended to establish a new policy generally, let alone a new policy specifically on the subject of citizenship as a prerequisite to entrance to the competitive civil service. Furthermore, it is reasonably clear that the reference to "national origin" was intended to convey the policy that *as between United States citizens*, no distinction should be made on the basis of their respective national origins. Thus, the reasonable interpretation of the Executive Order in question establishes that the Commission's regulation is not violative of that Order.

This analysis of the Order has proceeded upon the assumption that a purported conflict between an Executive Order and an agency regulation is court reviewable. That is, plaintiffs assume that an agency regulation may be declared invalid on the basis of an Executive Order. This proposition appears highly doubtful, and even more so in the case of an Executive Order which merely declares a general policy. *Manhattan-Bronx Postal Union* v. *Gronouski*, 350 F.2d 451 (D.C. Cir. 1965); *Nat'l. Assn'n. of Internal Revenue Emp.* v. *Dillon*, 356 F.2d 811 (D.C. Cir. 1966). Thus, this court would also conclude that even if the Commission's regulation did conflict with the Executive Order, such a conflict would not be judicially reviewable.

Plaintiffs' oth " main non-constitutional argument is that the Commission's regulation is inconsistent with § 502 of the Public Works Appropriation Act, 1970, Pub. Law 91-144, 83 Stat. 336-337, which provides in pertinent part as follows:

> [N]o part of any appropriation contained in this or any other Act shall be used to pay the compensation of any officer or employee of the Government of the United States (including any agency the majority of the stock of which is owned by the Government of the United States) whose post of duty is in continental United States unless such person (1) is a citizen of the United States, (2) is a person in the service of the United States on the date of enactment of this Act, who, being eligible for citizenship, had filed a declaration of intention to become a citi-

> zen of the United States prior to such date, (3) is a person who owes allegiance to the United States * * * *

Plaintiffs contend that the Civil Service Commission has impermissibly narrowed this Congressional enactment by wholly omitting that class of persons within category (2), and by restricting those within category (3) to persons who owe permanent allegiance to the United States. 5 C.F.R. § 338.101. It appears to this court, however, that the above section of the Appropriations Act did *not* derogate from the power of the Executive, granted in 5 U.S.C. § 3301, to establish standards for admission to the competitive civil service. Section 502 of the Appropriations Act has been part of the Act since the 1963 Act. There is no legislative history dealing with the provision. From this, two guides emerge: (1) the provision was obviously not intended to institute a significant change in Congressional policy, else debate would have surfaced; and (2) this court, in understanding this provision, should give to it whatever plain and natural meaning its words convey.

Following these guides, the court does not find any conflict between the provision of the Act and the Commission regulation. The Act merely sets forth those categories of persons who may be paid for their work as a federal employee. The Act does *not* state that those categories of persons must be eligible for competitive civil service positions.

This distinction is not a trifling one. The point of it is that Congress has in broad terms granted to the

Executive the authority to establish standards for admission into the civil service. 5 U.S.C. § 3301. Plaintiffs would have the court, however, read a provision in an Appropriations Act as negating that express grant of authority. The more sensible view of the relationship between § 502 of the Public Works Appropriations Act and 5 U.S.C. § 3301 is that § 502 merely sets forth the broad contours within which the Executive (the Commission) is free to use its good judgment and expertise. Thus, on the court's view of § 502 and the Commission regulation, no conflict appears. The Commission has acted permissibly in relation to the Appropriations Act in not opening up the civil service to all those whom Congress has indicated it would be willing to pay for their work.

Buttressing this conclusion in the observation that the authority and the discretion to establish standards for civil service qualification resided in the Executive long prior to the passage of § 502 of the Appropriations Act. If Congress had intended to withdraw this discretion, some mention of this important purpose would surely have been made, either in the Congressional debates, or on the face of the statute itself. Changes in established policy are not usually implemented silently. The court therefore concludes that the Commission's regulation is not invalid as inconsistent with the Appropriations Act.

Plaintiffs' constitutional arguments, while certainly not frivolous, are not as persuasive as the non-constitutional arguments just rejected.

Plaintiffs contend that the Classification herein,

between citizen and non-citizen, is subject to the rigid scrutiny of the "compelling interest" test, either because the classification is inherently suspect, or infringes upon a fundamental right. Plaintiffs then contend that when this strict test is applied, the classification must fall, since the federal government can offer no compelling justification.

In the court's view, however, this mode of analysis is incorrect. The Supreme Court has consistently pointed out that Congressional power—and, by a proper delegation, Executive power—respecting aliens is quite broad, almost plenary. *Harisiades* v. *Shaughnessy*, 342 U.S. 580 (1951); *United States* v. *ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537 (1949); *Carlsen* v. *Landon*, 342 U.S. 524 (1951). This extensive power is based in part upon the following considerations enunciated by Mr. Justice Jackson:

> It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference. [citations omitted].

Harisiades v. *Shaughnessy*, 342 U.S. at 588-589. The broad power over aliens also stems from Article 1, § 8 C1.4 of the Constitution, wherein Congress is given the exclusive power, "To establish a uniform rule of naturalization", and from Article 1, § 8 C1.18, wherein Congress is empowered to make all laws

which are "necessary and proper" for carrying into execution its enumerated powers. Moreover, the plenary power of the Congress with respect to aliens is further illustrated by those Supreme Court cases which have struck down state statutes respecting aliens because these statutes conflicted with the federal power to regulate immigration and naturalization. E.g., *Takahashi* v. *Fish and Game Commission*, 334 U.S. 410 (1947); *and cases cited therein* at 334 U.S. 419, n.6. In the latter case, Mr. Justice Black spoke for seven members of the Court:

> The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization. 334 U.S. at 419.

Given these authoritative statements on both the expansiveness of the power over aliens, and the partially political, non-justiciable content of that power, this court cannot agree with plaintiffs herein that the federal government must demonstrate a compelling interest for the classification it has drawn between citizens and non-citizens.[1] Rather, the proper

[1] The court notes that the regulation of the Civil Service Commission here under attack does not in fact draw a bright line between citizens and non-citizens, since those who owe permanent allegiance to the United States are also grouped with citizens. Just what constitutes permanent allegiance short of citizenship itself is not clear, but the plaintiffs have intentionally not availed themselves of that category since they aver only allegiance, not permanent allegiance, and attack the latter requirement.

standard of scrutiny here is the traditional one: Does the classification have a rational basis? or: Is the regulation reasonably adapted to some permissible end? See generally *Shapiro* v. *Thompson*, 394 U.S. 618, 661-663 (dissenting opinion of Mr. Justice Harlan).

When the classification herein is considered on the basis of this test, its validity is clear. The competitive civil service is an integral part of the Executive Branch of the government. It is quite rational and reasonable for the Executive, via a grant of power from the Legislature, to determine that the formation of policy and its execution, at whatever level, should be entrusted only to United States citizens. Moreover, as an alternative rational basis for the regulation herein, the Executive may intend that the economic security of its citizens be served by the reservation of competitive civil service positions to them, rather than to aliens.

The wisdom of the policy attacked in this court is simply not in issue here. The court must confine its inquiry more narrowly. Within this narrower examination, the court can only conclude that the government has the right to provide for the economic security of its citizens before its resident aliens, and that the government is entitled to think that it will function more smoothly and efficiently and more securely if competitive civil service positions are limited to citizens.

Accordingly, the court concludes that plaintiffs have failed to state a claim upon which relief can be granted. The defendants' motion to dismiss is granted; plaintiffs' motion for summary judgment is denied. The case is ordered dismissed.

So Ordered.

Dated: August 30, 1971.

/s/ Robert F. Peckham
United States District Judge

APPENDIX C

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
U. S. Court of Appeals and Post Office Building
7th & Mission Streets, P. O. Box 547
San Francisco, California 94101

Jan. 25, 1974

Re: No. 72-1070 MOW SUN WONG, ET AL. *vs.*
ROBERT E. HAMPTON, ETC., ET AL.

Dear Sir:

An opinion in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a judgment was entered 1-25-74 reversing and remanding the judgment or order of the court below (or administrative agency).

Pursuant to Rule 41(a) the mandate of this court will issue 21 days after the entry of judgment, unless the court enters an order otherwise, or grants a stay of the mandate or a petition for rehearing is filed. If a petition for rehearing is filed and denied, the mandate shall issue 7 days after the entry of the order denying the petition.

Very truly yours,

Clerk
U. S. Court of Appeals

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